STATE OF MICHIGAN

COURT OF APPEALS

VIRGIL PRUTEANU,

Plaintiff-Appellant,

v

ERICKSON'S FLOORING & SUPPLY CO., INC.,

Defendant-Appellee.

UNPUBLISHED
July 14, 2005

No. 260432
Oakland Circuit Court
LC No. 2003-053195-NO

Before: Cooper, P.J., and Fort Hood and R.S. Gribbs*, JJ.

MEMORANDUM.

Plaintiff Virgil Pruteanu appeals as of right the trial court order granting defendant Erickson's Flooring & Supply Co.'s motion for summary disposition pursuant to MCR 2.116(C)(10) in this negligence action. We reverse and remand for further proceedings consistent with this opinion. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was injured in defendant's warehouse while he was moving a box of hardwood flooring from a hi-lo into a truck. Defendant is a supply company. Plaintiff, a private individual, purchased flooring from defendant under a friend's commercial account. After paying for his purchase, plaintiff was directed to the warehouse. Warehouse employees informed plaintiff that they would be closing soon and that plaintiff was required to load the wood onto his truck himself. One of defendant's employees drove loads of wood flooring on the hi-lo to the rear of the truck, where plaintiff, his friend, and another employee unloaded the wood by hand. As plaintiff moved one of the boxes, another box fell and landed on his hand, fracturing it.

This Court reviews a trial court's determination regarding a motion for summary disposition de novo.[1] A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's

[1] *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

claim.[2] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."[3] Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[4]

In order to establish a prima facie case of negligence, a plaintiff must prove the existence of a duty, a breach of that duty, causation, and damages.[5] The trial court dismissed plaintiff's claims as it found that defendant did not owe plaintiff a duty.[6] Plaintiff argues for the first time on appeal that defendant voluntarily assumed a duty when it offered to assist in loading the wood into plaintiff's truck and that a "tort action will lie when performance of a contract creates a new hazard or dangerous condition." This Court may review an issue first raised on appeal if the question is one of law and the facts necessary for its resolution have been presented.[7]

"If one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform the act in a nonnegligent manner."[8] Such voluntarily actions "frequently . . . arise out of a contractual relationship" and can constitute a tort, as well as, a breach of contract.[9] While a defendant can be found liable for negligence that is "separate and distinct from the contractual obligation," a defendant is not negligent for failing to perform a contractual obligation.[10]

Plaintiff presented evidence that his injury was caused when defendant's employee negligently loaded the boxes of wood flooring onto the hi-lo. Whether plaintiff requested the employee to load the hi-lo or the employee took this action without being prompted, this conduct was voluntary and created a duty to load the hi-lo in a nonnegligent manner. Accordingly, the trial court improperly dismissed plaintiff's claims.

As plaintiff presented evidence of the existence of a duty, the trial court erred in determining that alleged violations of the federal Occupational Safety and Health Act, 29 USC

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[2] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

[3] *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

[4] *MacDonald, supra* at 332.

[5] *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

[6] We note that defendant likely owed plaintiff a duty of care as a business invitee. However, plaintiff *never* raised this argument and it is, therefore, deemed abandoned. *In re Forfeiture of Certain Personal Property*, 441 Mich 60, 84; 490 NW2d 322 (1992).

[7] *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992).

[8] *Fultz v Union-Commerce Assocs*, 470 Mich 460, 465; 683 NW2d 587 (2004).

[9] *Id.*, quoting *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967).

[10] *Id.* at 466-467.

651, and the Michigan Occupational Safety and Health Act, MCL 408.1001 *et seq.*, were irrelevant. Violations of a duty imposed by administrative regulations are, in fact, evidence of negligence.[11]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs

[11] *Ghaffari v Turner Construction Co*, 259 Mich App 608, 613; 676 NW2d 259 (2003), lv gtd 471 Mich 915 (2004).